National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: September 3, 1998

TO: Robert G. Chavarry, Regional Director, Region 25

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: N.K. Hurst Co., Case 25-CA-26115

530-4080-0175-8033, 530-4080-5012-6700

This Section 8(a)(5) case was submitted for advice on whether lawfully withdrew recognition based upon Employer knowledge that a majority of unit employees no longer wished to be represented by the Union.

The Union was certified and signatory to a bargaining agreement, which covered a unit of 41 employees and expired July 15, 1998. In May 1998, employee Key told a Union steward that Key was circulating a petition against the Union. The steward told Key that the window period for filing a Board petition had already passed. Key did not reveal whether he had already attempted to file his petition with the Region. Later than month, another employee Mews told Employer President Hurst that Key had attempted to file a Board election petition, but that the Region had rejected it as untimely filed by three days. Mews asked Hurst if there was anything else he could do, and Hurst said no. The next day, Mews asked Hurst if he wanted to see the employee petition and Hurst agreed to look at it.

The following week, Mews gave Hurst a petition which read "Petition to vote the union out." It was signed by 22 of the 41 unit employees. Hurst verified the employee signatures against its payroll records. The parties were scheduled to meet on June 25 to begin bargaining for a new agreement. On June 24, the Employer advised the Union that it was canceling that meeting and would not bargain in the future with the Union because the Employer believed that the Union did not have the support of a majority of unit employees. The Region uncovered no evidence of petition taint, nor any evidence of any Employer contemporaneous unfair labor practices.

We agree with the Region that the charge should be dismissed, absent withdrawal, because the Employer, in effect, lawfully refused to bargain for a successor agreement.[(1)]

In Celanese Corp. of America, 95 NLRB 664 (1951), the Board held that upon the expiration of the certification year or a contract, an employer may withdraw recognition if either the union has in fact lost majority support, or the employer has a good-faith doubt of the union's majority support or the employer has a good-faith doubt of the union's majority status supported by objective considerations.[(2)]

In Chelsea Industries,[(3)] the General Counsel, in arguing to the Board that the employer was not privileged to withdraw recognition from the union, made an alternative argument that the Celanese "good faith" doubt standard should be overturned. The General Counsel argued that the Celanese rule encourages employers to engage in self-help measures which undermine the Supreme Court's view that, "even after the certification year has passed, the better practice is for an employer with doubts to keep bargaining and petition the Board for a new election or other relief."[(4)] Thus, the General Counsel argued that a secret-ballot election should be the only means by which a Section 9(a) representative's presumption of majority status can be rebutted.

We conclude that it would not be appropriate in this case to issue complaint solely on the General Counsel's alternate theory in Chelsea Industries, particularly in view of the Board's recent pronouncement in Auciello. The Employer here had knowledge of the loss of majority status, and the Board currently permits an employer to withdraw recognition on this basis. Thus, there is no argument under current Board law supporting a violation. Furthermore, retroactive application of any new rule of law

announced in Chelsea would be uncertain. Thus, under the law as it now stands, this case should be disposed of in accord with the long standing practice of General Counsels to dismiss charges alleging that an employer unlawfully withdrew recognition after the certification year or after expiration of a contract in circumstances where the union has in fact lost majority status among unit employees without any unlawful interference by the employer.[(5)]

Accordingly, the Region should dismiss this Section 8(a)(5) charge, absent withdrawal.

B.J.K.

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[1] See Abbey Medical/Abbey Rents, Inc., 264 NLRB 969 (1982)(recognition lawfully withdrawn 66 days before contract termination); Auciello Iron Works, 317 NLRB 364, 368 (1995)("Within a reasonable time before a collective-bargaining agreement expires, an employer that establishes a good-faith doubt of a union's majority status may announce that it does not intend to negotiate a new agreement.")

[2] This principle was recently noted by the Board in Auciello Iron Works, 317 NLRB 364 (1995), on remand from 980 F.2d 804 (1st Cir. 1992).

[3] Cases 7-CA-36846 et al.

[4] Brooks v. NLRB, 348 U.S. 96, 104 n.18 (1954). See also Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 50 n.16 (1987) (allowing employers to rely on employees' rights in refusing to bargain is inimical to industrial peace) (dictum).

[5] See, e.g., Ayers Corp., Case 21-CA-29761, Advice Memorandum dated July 18, 1994; J.P. Data Com, Cases 21-CA-26562 and 26579, Advice Memorandum dated April 3, 1989.